3-1901-15289-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Scott Brener, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

v.

Fiberglass Structures and Tank Co., Inc.,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on April 23, 2003, at the Chisago County Courthouse, Center City, Minnesota. The record closed on July 1, 2003, upon receipt of post-hearing letter briefs.

Julie A. Leppink, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, MN 55103-2122, appeared on behalf of the Minnesota Department of Labor and Industry (Department).

John Rysgaard, CEO, and Thomas Rysgaard, President, appeared without counsel for Fiberglass Structures & Tank Company (Respondent), P.O. Box 582, Wyoming, MN 55092-0582.

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat. §§ 182.661, subd 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

STATEMENT OF ISSUES

1. Did the Respondent fail to abate violations of federal regulations, incorporated by reference pursuant to Minn. R. 5205.0010, subp. 2, which required installation of an eyewash station and implementation of administrative or engineering controls to reduce both short-term (15-minute) and 8-hour exposure to styrene?

The Administrative Law Judge concludes that the Respondent failed to abate the violation of 29 C.F.R. § 1910.151(c), requiring installation of an eyewash station, by the specified abatement date.

The Administrative Law Judge concludes that the Respondent did not violate the air contaminant standard for styrene that was in effect when the original citation was issued and that accordingly there is no legal basis for a citation for failure to abate.

2. Has the Department proposed reasonable penalties for failure to abate the violations?

The Administrative Law Judge concludes that the appropriate penalty amount for failing to install the eyewash station in a timely manner is $ 11,250. The other penalties proposed by the Department are excessive and unreasonable.

Based upon all the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Statutory Background

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-71, requires employers to comply with occupational health and safety standards promulgated by the Department of Labor. States may assert jurisdiction over occupational health and safety issues by obtaining federal OSHA approval of a state plan.[1] Minnesota received approval for its state plan on July 30, 1985. State plans need not be identical to the federal OSHA program, but they must be "at least as effective" as the federal program.[2]

2. On January 19, 1989, federal OSHA adopted a final rule revising its Air Contaminants standard, § 1910.1000 and Tables Z-1-A, Z-2, and Z-3.[3] Among the many changes made by the rule was the inclusion of Short Term Exposure Limits (STEL) to complement 8-hour time-weighted average (TWA) limits for a number of air contaminants, including styrene.[4] The primary reason for limiting styrene exposure was its narcotic effect.[5] Pursuant to Table Z-1-A, the STEL for styrene was 100 ppm, and the 8-hour TWA was 50 ppm.[6]

3. On July 31, 1989, the Minnesota Department of Labor and Industry incorporated by reference the OSHA standards for air contaminants contained in the final rule.[7]

4. In 1992, the Eleventh Circuit Court of Appeals vacated and remanded the federal air contaminants standard on the basis that OSHA had failed to demonstrate that the existing exposure limits in the workplace presented a significant risk of material health impairment or that the new standards eliminated or substantially lessened the

risk, and that OSHA had failed to demonstrate that the new permissible exposure limits were either economically or technologically feasible.[8]

5. In 1993, in response to the decision by the Eleventh Circuit, federal OSHA removed Table Z-1-A from 29 C.F.R. § 1910.1000 and replaced it with Table Z-1, which contains the exposure limits in effect prior to 1989.[9] Under federal law in effect since 1993, there is no short-term exposure limit for styrene, and the 8-hour TWA limit is 100 ppm.

6. The Minnesota Department of Labor and Industry did not adopt by reference the 1993 revision to 29 C.F.R. § 1910.1000, nor did it commence any rulemaking proceeding to establish its own rule containing more stringent air contaminant standards. Because it did not specifically adopt replacement Table Z-1, the Department contends that Table Z-1-A remains the standard in Minnesota.[10]

Factual Background

7. Fiberglass Structures and Tank Co. is located at 26615 Fallbrook Avenue North in Wyoming, Minnesota. In 1999 it had 13 employees. It manufactures fiberglass domes and tanks, primarily for the wastewater industry. The tanks and domes are made in sections, and are then installed on site. Many of the domes are quite large, spanning 30 feet.

8. The production process starts with the making of a wood form. Once a form is constructed, it is rubbed with wax and a substance to keep fiberglass from sticking to it. Fiberglass is then laid over the form in alternating layers of sprayed fiberglass and hand-laid woven fiberglass material. When spraying fiberglass, employees use a “chopper gun” that chops fiberglass into 3-in. lengths, mixes it with resin and hardener, and sprays it onto the form. After the chopper operator lays about one-fourth of an inch of fiberglass on the form, other workers use metal rollers to make it smooth and to remove air pockets. Then woven fiberglass is applied using a similar process. The chopper operator lays down a layer of resin mixed with hardener, employees hand-lay the woven fiberglass over the resin, more resin mixed with hardener is sprayed over the material, and employees use metal rollers to make it smooth and to remove air pockets. After the fiberglass hardens, the component is pulled off the form using a block and tackle attached to the structural beams of the ceiling. Employees finish the product by removing excess fiberglass material, sanding with electric and/or pneumatic sanders, hand sanding, and applying paint with rollers.[11]

9. The fiberglass resin and gel coat paint used in the production process contain styrene, which is dispensed on the premises from a tank capable of holding 20,000 lb; the hardener contains methyl ethyl ketone peroxide (MEKP), which is dispensed from plastic jugs. Both chemicals are hazardous substances.[12]

10. Peter Kuzj is an industrial hygienist employed by the Department. On December 1-3, 1999, Kuzj conducted an inspection of FST after receiving a referral

from the OSHI safety division. At that time the employer had no safety or health programs; however, it did provide safety glasses, ear plugs, and half-mask negative pressure respirators to employees for voluntary use.[13] On December 1, Kuzj determined that no eyewash facilities were provided near the area where MEKP is dispensed and that the nearest source of water for employees in the production area was in the employee bathroom located between 60 to 200 feet away.[14]

11. The next day, December 2, 1999, Kuzj conducted sampling of short-term exposure levels (STEL) for styrene. Based on the results, he determined that full-shift samples were necessary. The following day, December 3, 1999, Kuzj took full-shift samples from four employees that laid fiberglass and painted for several hours throughout the day. STEL samples were taken on another employee. During work on that shift three employees chose to wear respirators; one of them wore a full beard that prevented the respirator from sealing effectively.[15]

12. The results of the testing showed that on December 3, 1999, four employees were exposed to styrene in excess of the 15-minute STEL of 100 ppm, as provided in Table Z-1-A. On the same date, two employees were exposed to styrene in excess of 50 ppm, the exposure limit for the 8-hour TWA, as provided in Table Z-1-A.[16] Under the federal standard in effect then and now, there was no STEL for styrene, and the 8-hour TWA was 100 ppm. The Respondent did not violate the federal standard for styrene.[17]

13. The Department determined that FST had committed several violations, all of which were categorized as serious because of the severity of the injuries that could occur as a result of an accident. The penalty for Citation 1, Item 1 (failure to provide an eyewash facility), was calculated pursuant to the Minnesota OSHA Field Compliance Manual as follows: Based on the severity/probability index of E-4, the unadjusted penalty was $2,500. In applying penalty adjustment factors, the Department included no credit for good faith because the employer had no safety or health program in place; a 55% credit for size, because the employer had only 13 employees; and 10% credit for history, because it had no history of willful, repeated, or failure to abate citations. The adjusted proposed penalty was $875.00.[18] The Department set an abatement period of 55 days, until April 12, 2000, to allow the employer time to purchase and install a free-standing heated eyewash.[19] The Department provided specific abatement notes concerning the capacity, placement, and type of eyewash required (hands-free), including water temperature and water pressure.[20]

14. The Department grouped Citation 1, Items 2a-2c together: failure to establish and maintain a respiratory protection program as required by 29 C.F.R. § 1910.134(c); employee exposure to styrene in excess of the STEL listed in Table Z-1-A of 29 C.F.R. § 1910.1000(a)(3); and failure to implement feasible administrative or engineering controls to achieve compliance with the STEL limits for styrene prescribed in 29 C.F.R. § 1910.1000(a) through (d). Based on the severity/probability index of E-5, the unadjusted penalty was $4,000.00. After applying the penalty credits identified above, the adjusted penalty was $1,400.00. The Department set a multi-step

abatement period: the employer would have 14 days to have employees medically evaluated, fit tested, and trained on use of respirators; 25 days to implement a written respiratory protection program; and 45 days (April 12, 2000) to implement engineering controls.[21]

15. The Department also grouped Citation 1, Items 3a-3c together: failure to establish and maintain a respiratory protection program as required by 29 C.F.R. § 1910.134(c); employee exposure to styrene in excess of the 8-hour TWA listed in Table Z-1-A of 29 C.F.R. § 1910.1000(a)(3); and failure to implement feasible administrative or engineering controls to achieve compliance with the 8-hour limits for styrene prescribed in 29 C.F.R. § 1910.1000(a) through (d). Based on the severity/probability index of E-5, the unadjusted penalty was $4,000.00. After applying the penalty credits for size and history, the adjusted penalty was $1,400.00. The Department agreed to a multi-step abatement period, identical to that set for Items 2a-2c above.[22]

16. The Department issued the citations, including the abatement dates and proposed penalties described above, on February 12, 2000.[23] The employer filed a notice of contest, received by the Department on March 3, 2000. In its notice of contest, the employer contested the type of violation and the proposed penalties, but did not contest the abatement dates.[24]

17. The Department and the employer negotiated a settlement agreement providing, in part, that the penalties for the above citations would be reduced from a total of $3,675.00 to $1,475.00. The settlement agreement specifically provides that the employer agrees that the dates for abating the citations shall be the dates set forth in the citations.[25] The employer signed the agreement on October 16, 2000.[26]

18. On February 8, 2001, Kucj conducted a follow-up inspection to verify that the violations had been abated. He interviewed the general manager, who told him that the employer had written an Employee Right to Know (ERTK) program but had not yet done any training; the employer had obtained a quote for a respiratory protection program but found it too expensive; and that the employer had not yet installed an eyewash or implemented any engineering changes to reduce employee exposure to styrene.[27] Kocj conducted “grab” sampling for styrene, but did not repeat the monitoring for short-term or 8-hour permissible exposure levels. He found no new violations, but notified the employer that it would receive citations for failure to abate the earlier violations.

19. The OSHA Field Compliance Manual provides that failure to abate penalties are calculated by starting with the original unadjusted penalty or $1,000, whichever is greater. This penalty is to be multiplied by a failure-to-abate (FTA) factor related to the number calendar days past the abatement date. For violations that are not corrected more than 50 days past the abatement date, an FTA factor of 7 is to be used. In situations where the FTA is “flagrant or extremely delinquent,” the Area OMT Director may approve FTA factors of 8-30.[28] The resulting number is to be reduced by

penalty credits for size only; no credit is allowed for good faith, and the history credit may be eliminated or reduced to 5% depending on the extent of the failure to abate.[29]

20. For the failure to provide an eyewash in the work area, the Department used the original unadjusted penalty amount of $2,500.00, multiplied it by an FTA factor of 10, and reduced the resulting amount by the 55% size credit. The resulting proposed FTA penalty was $11,250.00. Similar calculations were made for the violations relating to short-term and 8-hour styrene exposure, resulting in proposed FTA penalties of $18,000.00 each. Safety and health OMT directors approved the FTA factor of 10.[30]

21. The Department issued FTA citations, reflecting the original abatement dates and the new proposed penalties, on March 7, 2001.[31]

22. On May 10, 2001, Kucj conducted another follow-up inspection to verify that the violations had been abated. At this time, the general manager and six other employees had been laid off, so the company had a total of six employees. The shop foreman confirmed that no safety or health training had been provided to employees, no respiratory protection program had been implemented, no engineering or administrative controls had been implemented to reduce employee exposure to styrene, and an eyewash station had been purchased but not connected to a water supply (there was no water supply in the production area, so the Respondent had to connect the eyewash stand to its sprinkler system in order to ensure a constant water temperature in the required range). Kocj again conducted “grab” sampling for styrene, but did not repeat the monitoring for short-term or 8-hour permissible exposure levels. He found no new violations, but advised the employer that it would be cited again for failure to abate.[32]

23. The Department calculated the second FTA penalties as follows. For the failure to provide an eyewash in the work area, the Department used the original unadjusted penalty amount of $2,500.00, multiplied it by an FTA factor of 20, and reduced the resulting amount by the 55% size credit and a 10% credit for partial abatement. The resulting proposed FTA penalty was $20,250.00. Similar calculations were made for the violations relating to short-term and 8-hour styrene exposure, using FTA factors of 20 but without any credit for partial abatement. The resulting proposed FTA penalties were $36,000.00 each. Safety and health OMT directors approved the FTA factor of 20.[33]

24. The Department issued the second set of FTA citations on June 14, 2001, seeking a total penalty of $92,250.00.

25. The last set of citations clearly got the Respondent’s attention. By June 28, 2001, the plumbing was completed to make the eyewash station operable, an employee right to know meeting conducted and safety officer appointed.[34] At some point after this the respirator manufacturer came to the plant and provided training to employees on proper use of the respirators. The employees have been fit-tested and medically evaluated. The office manager has submitted several drafts of the written respiratory protection program to the Department.[35] Substantial ventilation was added

to the middle and east rooms by April 2002.[36] In April of 2002, Kucj repeated the monitoring for 15-minute and 8-hour exposures to styrene. Although the results for 15-minute exposure were still not compliant with the limits set in Table Z-1-A, the 8-hour exposures were satisfactory.[37]

26. FST has been in operation for more than 50 years. It has no history of employee injuries from MEKP and no knowledge of any long-term respiratory problems in any current or former employees.

27. The proposed FTA penalties of $92,250.00 exceed the ten-year earnings of the company. Enforcement of the penalties as written would likely require closure of the company.[38]

28. The employer filed a Notice of Contest on July 3, 2001, contesting both the failure to abate citations and the amount of the penalties.

29. On September 27, 2001, the Department issued a Summons and Notice and a Complaint concerning these violations.

30. On February 4, 2003, the Department served a Notice and Order for Hearing on the Respondent.

31. On April 16, 2003, the Department filed a Notice of Motion and Motion for Default Judgment and to Preclude Testimony, which was withdrawn at the commencement of the hearing.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction to consider the Respondent's protest under Minn. Stat. § 182.661, subd. 3, and 14.50.

2. The Department gave Respondent proper notice of the hearing and fulfilled all relevant substantive and procedural requirements of statute and rule.

3. The Respondent is an employer, as defined in Minn. Stat. § 182.651, subd. 7.

4. The Department has the burden of proof to establish by a preponderance of the evidence the occupational safety and health violation charged and the appropriateness of the penalty proposed.

5. Any employer who has received a citation for a serious violation of its duties under Minn. Stat. § 182.653, or any standard, rule, or order adopted under the

authority of the commissioner, shall be assessed a fine not to exceed $7,000 for each violation.[39] Any employer who fails to correct a violation for which a citation has been issued may be assessed a fine of not more than $7,000 for each day during which the failure or violation continues.[40]

6. The Respondent failed to abate the violation of 29 C.F.R. § 1910.151(c), requiring installation of an eyewash stand, by the established abatement date.

7. The Respondent's violation of 29 C.F.R § 1910.151(c) is serious within the meaning of Minn. Stat. § 182.651, subd. 12, because it created a substantial probability that serious physical harm could result from an accident.

8. The original penalty amount and adjustments thereto were appropriately calculated for this violation pursuant to the MN OSHA Field Compliance Guide and Minn. Stat. § 182.666.

9. The first FTA penalty calculated for this violation using an FTA multiplier of 10 to produce a proposed penalty of $11,250 is reasonable and appropriately calculated pursuant to the MN OSHA Field Compliance Guide and Minn. Stat. § 182.666, considering the excessive time it took the Respondent to abate the violation.

10. The second FTA penalty calculated for this violation using an FTA multiplier of 20 to produce a proposed penalty of $20,250 is excessive and unreasonable. It is a disproportionate enhancement of the original unadjusted penalty of $2,500.

11. In 1989 the Department incorporated by reference Table Z-1-A of the revised federal OSHA standards for air contaminants, including styrene.[41]

12. In 1993, federal OSHA revoked Table Z-1-A, removed it from 29 C.F.R. § 1910.1000, and replaced it with Table Z-1.[42]

13. Under Minnesota law, when an act adopts the provisions of another law by reference it also adopts by reference any subsequent amendments of such other law, except where there is clear legislative intention to the contrary.[43] This principle is also applicable to rules.[44]

14. Pursuant to Minn. Stat. § 645.31, subd. 2, the effect of federal OSHA's amendment of 29 C.F.R. § 1910.1000 removing Table Z-1-A was to incorporate the amendment into state law.

15. The Department has failed to establish that the Respondent violated the applicable exposure limits for styrene under state law.

16. Because the Department has failed to establish the initial violation, there is no legal basis for a failure to abate citation concerning exposure limits for styrene.

17. Even if there were a basis for finding the Respondent violated state or federal law, the $70,000 FTA penalty proposed by the Department for these alleged violations would be excessive, unreasonable, and a disproportionate enhancement of the original penalty of $4,000 per violation.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. Citation No. 1, Item 1, failure to abate a violation of 29 C.F.R. § 1910.151(c), should be and hereby is AFFIRMED.

2. The appropriate penalty for failing to abate this violation is $11,250.

3. Citation No. 1, Items 2(a)-(c) and 3(a) through (c), failure to abate violations of air contaminant standards for styrene, should be and hereby are REVERSED.

Dated this 17th day of July, 2003.

/s/ Kathleen D. Sheehy

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KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Tape recorded (four tapes).

MEMORANDUM

There are two significant issues concerning the standards for air contaminants raised in this case. First, as noted above, the Department relied on its adoption by reference of a federal standard to support its finding of a violation, without any disclosure to the Respondent, or to the Administrative Law Judge, that the referenced standard was amended by federal OSHA and is no longer in effect. When asked to respond to this issue after the hearing, the Department responded that its position is that Table Z-1-A remains part of Minnesota's standard because the amendment replacing it was not specifically adopted in Minnesota.

Minn. R. 5205.0010, subp. 1 (2001) provides that the Department rules "are amended by incorporating and adopting by reference, and thereby making a part thereof, Title 29 of the Code of Federal Regulations" as listed in subparts 1a to 7. Subpart 2 of that rule incorporates 29 C.F.R. § 1910 as published and corrected through November 7, 1978, and "subsequent changes as follows." What follows is several

pages of citations to specific federal standards, including the 1989 air contaminants standard containing Table Z-1-A.[45] The Department contends that because Minn. R. 5205.0010 "is clear on its face" in adopting only specified changes to § 1910, Minn. Stat. § 645.31, subd. 2, is inapplicable.

Minn. Stat. § 645.31, subd. 2, is not an interpretive aid used to clarify ambiguous or otherwise unclear wording in statutes or rules; it applies when the legislature or a state agency has adopted by reference an act or rule, and the adopted act or rule is subsequently amended. The statute operates to incorporate the revision into state law automatically unless there is "clear legislative intention to the contrary." The fact that the Department selectively has adopted individual federal standards over the past 25 years does not answer the question raised here, which is, when one of those individual federal standards the Department has selectively adopted pursuant to Minn. R. 5205.0010 is later amended by federal OSHA, does the amendment become operative under state law?

The Department has identified no action taken in response to the 1993 amendment of the federal air contaminants standard, maintaining essentially that its lack of response to the revocation of these federal standards is sufficient to indicate the agency's "legislative intention" to override Minn. Stat. § 645.31, subd. 2.[46] This argument is contrary to the explicit terms of the statute, which serves the purpose of keeping state law consistent with enactments borrowed from other jurisdictions. If an agency's inaction were sufficient under these circumstances to overcome the statutory presumption that subsequent amendments to provisions adopted by reference are also adopted, the statute would be rendered meaningless.

The second issue raised by the Department's reliance on a federal standard that has been revoked is one of certainty—how is one to determine what the law is in the state of Minnesota? In this case the Department's citation paperwork, as well as the Department's rule, refer to a federal regulation that no longer exists. One cannot go to the current Code of Federal Regulations, open it, and find the referenced provision. One cannot even go to the Federal Register citation referenced in the rule to determine whether this is current law. In fact, it took the Administrative Law Judge several hours of legal research to determine that the Department's citation was to a standard that was amended, revoked and replaced in 1993. It seems particularly unfair to a party that is not represented by counsel and lacks resources, financial and otherwise, to require this amount of effort to find the standard that the Department maintains is controlling.

If the Department wished to adopt a standard that was more stringent than that currently contained in Tables Z-1 and Z-2, then the Department should have used its rulemaking authority to adopt its own standard. It did not do so. By operation of Minn. Stat. § 645.31, subd. 2, the Administrative Law Judge concludes that the exposure limits for styrene in Minnesota are the same as those contained in the federal OSHA rule since 1993. Under this standard, there is no violation, and there is no basis for a failure to abate citation.

Although the Administrative Law Judge has reduced the amount of the penalty for failure to abate the violation concerning the eyewash station, the reduced penalty amount is still substantial in light of the Respondent's financial condition, and a substantial penalty is entirely justified by the Respondent's delay in addressing this violation. The Respondent represented, by signing the settlement agreement in October 2000, that the violations had been abated by April of that year. Only after the Department issued its second set of penalties for failure to abate in May 2001 did the Respondent earnestly begin its attempts to abate the violation.

The MN OSHA Field Compliance Guide provides that a multiplier of 7 applies to all failures to abate that go beyond 50 days. In cases of "flagrant" violations, multipliers of between 8 and 30 may be used if approved by area OMT directors. There is no testimony in the record as to how the Department distinguishes between a failure to abate that would justify a multiplier of 7, as opposed to failures to abate that would justify multipliers of 20 or more. The inspector, Peter Kuzj, knew only that area OMT directors selected an FTA multiplier of 10 for the first failure to abate penalties, and then two months later doubled the multiplier to 20 when the violations were still not corrected.

There must be a reasonable relationship between the nonabatement penalties and the penalties assessed for the original citation.[47] The Department's use of the multiplier of 20 results in a penalty (for all alleged violations) that is actually 25 times the original penalty, and although effective in focusing the Respondent's attention on the violations, appears to be a disproportionate enhancement of the original penalty.

K.D.S.

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[1] 29 U.S.C. § 667.
[2] 29 U.S.C. § 667(c)(2); Minn. Stat. § 182.655.
[3] 54 Fed. Reg. 2332 (January 19, 1989).
[4] *Id*.; 29 C.F.R. § 1910.1000, Table Z-1-A (1989).
[5] 54 Fed. Reg. at 2357.
[6] 54 Fed Reg. at 2952.
[7] 14 State Reg. 216 (July 31, 1989); Minn. R. 5205.0010, subp. 2(L)(1).
[8] *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992).
[9] 58 Fed. Reg. 35338 (June 30, 1993).
[10] Letter Brief dated June 27, 2003.
[11] Ex. 2 at 3-4.
[12] *See* Minn. Stat. § 182.651, subd. 14(a) (hazardous substances are those regulated under 29 C.F.R. § 1910, subpart Z); 29 C.F.R. § 1910.1000(a), Tables Z-1, Z-2.
[13] Ex. 2 at 4.
[14] *Id*. Pursuant to 29 C.F.R. § 1910.151(c), where employees are exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body must be provided within the work area for immediate emergency use.
[15] *Id*.
[16] Ex. 2 at 10, 16, 29-30. Pursuant to 29 C.F.R. § 1910.1000(e) (2001), employers must implement feasible administrative or engineering controls to achieve compliance with the exposure limits prescribed

in 29 C.F.R. § 1910.1000(a) through (d). The permissible exposure limits for styrene are contained in Table Z-2.
[17] *See* Ex. 2 at 30 (no results in excess of 88 ppm).
[18] Ex. 2 at 6.
[19] Ex. 2 at 7.
[20] Ex. 2 at 6.
[21] Ex. 2 at 12.
[22] Ex. 2 at 18.
[23] Ex. 3, attached Ex. A (this attachment is erroneously labeled Ex. A; the terms of the settlement agreement make clear that it should be labeled Ex. B).
[24] Ex. 3 ¶ 2.
[25] *Id*. ¶ 8.
[26] *Id*. at 5.
[27] Ex. 4 at 4.
[28] MN OSHA Field Compliance Manual, received April 25, 2003.
[29] *Id.*
[30] Ex. 4 at 5-7.
[31] Ex. 5 at 1-2.
[32] Ex. 6.
[33] Ex. 6 at 6-8.
[34] Ex. 12.
[35] The Department did not offer the drafts into evidence or offer any testimony as to how they are deficient. The Respondent was not aware prior to the hearing that the Department still viewed the written respiratory protection program as noncompliant.
[36] Testimony of John Rysgaard, Thomas Rysgaard.
[37] Testimony of Peter Kuzj. The Department did not offer these test results into the record, so there is no way to evaluate the margin of noncompliance with this standard.
[38] Letter Brief of Thomas Rysgaard, May 15, 2003.
[39] Minn. Stat. § 182.666, subd. 2.
[40] *Id*., subd. 4.
[41] 14 State. Reg. 216 (July 31, 1989).
[42] 58 Fed. Reg. 35338 (June 30, 1993).
[43] Minn. Stat. § 645.31, subd. 2.
[44] Minn. Stat. § 645.001.
[45] Minn. R. 5205.0010, subp. 2(L)(1)j
[46] Nor has the Department addressed the possible impact of Minn. Stat. § 182.655, subd. 12, on resolution of this issue. That section provides that occupational safety and health standards shall not be different from federal standards where the standard significantly affects interstate commerce, unless such standards are required by compelling local conditions and do not unduly burden interstate commerce.
[47] *See, e.g., Empire Art Products Co.*, 2 OSHC 1230 (Rev. Comm'n 1974)(reducing nonabatement penalties from $3,250 to $375 on basis that it was disproportionate to the original penalty). *Cf. State Farm Mut. Automibile Ins. Co. v. Campbell*, __ U.S. __, slip op. at 15 (Apr. 7, 2003) (sanctions of double, treble, or quadruple damages to deter and punish are more likely to comport with due process than those using double-digit multipliers; the measure of punishment must be both reasonable and proportionate to the harm done and the general damages recovered).